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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91166487
Party	Plaintiff Hasbro, Inc.
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Date	04/20/2011
Attachments	Second Motion to Amend and Second Amended Pleading.pdf (27 pages) (942175 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 78/359,895
Filed: January 30, 2004
For the Mark: MEMORY MAGIC in International Class 28
Published in the Official Gazette: May 10, 2005 at TM 330

HASBRO, INC.

Opposer,

v.

CREATIVE ACTION LLC,

Applicant.

Opposition No. 91/166,487

SECOND MOTION TO AMEND OPPOSER'S NOTICE OF OPPOSITION

Opposer Hasbro, Inc. ("Hasbro") respectfully submits this motion to amend the Notice of Opposition to address concerns that have been raised by Applicant Creative Action LLC ("Creative Action") and this Board in connection with the identification of goods proposed in Hasbro's claim under Section 18 of the Lanham Act. The motion is in the interests of justice because it will allow for greater flexibility in determining what the proper identification should be.

Preliminary Statement

Hasbro's proposed Second Amended Notice of Opposition ("Second Amended Notice," attached hereto as Exhibit A) does not seek to add any new claim. Its sole purpose is to refine the language of Hasbro's Section 18 claim, to make its proposed restriction of Creative

Action's identification of goods as accurate as possible, and to provide the Board with greater flexibility in fashioning a remedy under Section 18 that will avoid any likelihood of confusion between the parties' marks. Granting leave for Hasbro to file its Second Amended Notice will not change the nature of the Section 18 claim, and will not require any additional discovery or impair Creative Action's ability to prepare its defense, and therefore will not result in any prejudice to Creative Action.

Statement of Facts

A. Proceedings to Date

Hasbro was granted leave to amend its Notice of Opposition in this proceeding once before, on May 13, 2010. (Docket # 58) The Amended Notice of Opposition withdrew the claim that Creative Action's product was likely to cause confusion and substituted a claim pursuant to Section 18 of the Lanham Act requesting that the Board "modify the application or registration [in an opposition, concurrent use, or cancellation proceeding] by limiting the goods or services specified therein" or "otherwise restrict or rectify with respect to the register the registration of a registered mark." 15 U.S.C. § 1068.

Hasbro explained in the motion to amend that it had learned that, although Creative Action's identification of goods describes its Memory Magic product as a "therapeutic game in the nature of a trivia game and a bingo game for engaging persons with memory loss consisting of game cards that contain answers to questions and calling cards that contain questions and information related thereto," the Memory Magic product is actually a therapeutic product for individuals suffering from memory loss, not a game, and it has little in common with Hasbro's famous MEMORY game. (See Docket # 52 at 4-7) Indeed, Creative Action admitted as much. Accordingly, Hasbro argued, the problem presented in this opposition lies not in any likelihood of confusion between the parties actual products, but in Creative Action's overbroad

and inaccurate identification of goods – a problem that can be resolved by modification or restriction of Creative Action’s identification pursuant to Section 18 of the Lanham Act, which would eliminate any likelihood of confusion between the parties’ marks. (See id. at 7-10)

In connection with its motion, Hasbro submitted a proposed Amended Notice of Opposition (“First Amended Notice”). (Docket # 52, Exh. A) The Section 18 claim contained in that Notice proposed modifying Creative Action’s identification of goods as follows:

therapeutic activity kit intended for use by nursing homes and other elderly care facilities to promote the use of cognitive abilities of elderly persons with memory loss, comprised of cards that contain questions and related prompts for discussion, cards that contain an array of potential answers to the questions, and a board used by participants.

(See id. ¶ 10) It also proposed that Creative Action’s application should be reclassified in International Class 10 rather than International Class 28. (See id. ¶ 11)

Creative Action opposed Hasbro’s motion to amend principally by arguing that the identification proposed by Hasbro was too restrictive because its Memory Magic product is not used only in nursing homes and other elderly care facilities, nor is it used only by elderly persons. (Docket # 56 at 5) The Board held, however, that Hasbro had “pleaded facts which, if proven, would establish the necessary elements for a claim for restriction under Section 18,” namely, that Hasbro’s proposed restriction of Creative Action’s identification of goods would avoid any likelihood of confusion with Hasbro’s MEMORY mark and that Creative Action is not using its alleged Memory Magic mark on the goods deleted or effectively excluded from its registration. (Docket # 58 at 8)

Shortly thereafter, on May 27, 2010, Creative Action filed a motion for summary judgment on the counterclaim it had brought in opposition to Hasbro’s original Notice of

Opposition. (Docket # 59) Hasbro filed a cross motion for summary judgment on its Section 18 claim on July 8, 2010. (Docket # 71)

Hasbro's cross motion for summary judgment relied on Creative Action's own admissions and testimony as to the product for which it sought registration, in order to respond to some objections raised by Creative Action in opposing the motion to amend and to make its proposed modification of Creative Action's identification both as accurate and as unobjectionable as possible. Specifically, Hasbro proposed an identification based directly on sworn interrogatory responses provided by Creative Action; that language differed in some respects from the language in Hasbro's First Amended Notice. It suggested that Creative Action's identification of goods be modified to:

Activity/ program for groups and for people with dementia, head trauma or stroke living in long term care facilities or attending adult day care centers and older adults with these cognitive impairments living at home and staff training programs related to the MEMORY MAGIC activity, marketed to long-term care facilities, adult day care centers, home health care agencies, psychiatric hospitals and units, and care givers of older adults with dementia, head trauma or stroke who live at home through trade show exhibits, direct marketing, and distributors of products to health and long term care industries.

(Docket # 71 at 7)

On February 3, 2011, the Board denied both Creative Action's motion for summary judgment and Hasbro's cross motion for summary judgment. (Docket # 82) With respect to Hasbro's cross motion, the Board held that "because the proposed restriction set forth in the cross-motion differs in several respects from the proposed restriction set forth in the amended notice of opposition ... Hasbro is seeking entry of summary judgment on an unpleaded issue." (*Id.* at 8) The Board further noted concerns about the language of the proposed restriction set forth in Hasbro's cross motion, namely that the proposed restriction was

impermissibly indefinite because it did not “set forth the nature of the goods at issue” as did the restriction proposed in Hasbro’s First Amended Notice, and that the proposed restriction impermissibly expanded the scope of the identification of goods by deleting the composition of the product at issue. (Id. at 8-9) Finally, the Board held that there were genuine disputes as to whether the proposed restriction would avoid a likelihood of confusion; as to whether Creative Action uses or intends to use its mark on goods that would be effectively excluded from its identification; and as to whether the proposed amended classification is appropriate. (Id. at 9-10) The current motion would amend the notice of opposition to deal with those specific issues.

B. Hasbro’s Proposed Amendment

Hasbro does not seek to assert any new claim against Creative Action. Hasbro seeks only to revise the language of its Section 18 claim to address concerns raised by Creative Action and by this Board, and to afford the Board greater flexibility in fashioning a remedy under Section 18 that will fairly resolve Hasbro’s claim.

Specifically, Hasbro seeks to modify the proposed restriction of Creative Action’s identification of goods to incorporate language used by Creative Action in its own sworn interrogatory responses regarding channels of trade and intended use, while ensuring that the restriction is not impermissibly indefinite and does not impermissibly expand the scope of the identification of goods. (See Exh. A ¶¶ 13, 19) Hasbro also expressly states what was implicit in the prior pleading: its willingness to accept any similar modification or restriction that the Board deems appropriate. (Id.) Further, although Hasbro continues to firmly believe that Creative Action’s Memory Magic product is not a game and that the evidence will bear out Hasbro’s belief, Hasbro seeks to be able to argue in the alternative such that, if the Board ultimately concludes that the Memory Magic product should be described as a game, Creative Action’s identification of goods should nonetheless be modified to reflect its channels of trade

and intended use, to avoid any likelihood of confusion with Hasbro's MEMORY mark. (See Exh. A ¶¶ 17-21) Finally, although Hasbro believes and intends to prove that either of the alternate restrictions it proposes in its Section 18 claim will avoid any likelihood of confusion with Hasbro's famous MEMORY mark, Hasbro proposed Second Amended Notice states Hasbro's willingness, if necessary, to restrict its own identification of goods to "children's" games if the Board finds that a likelihood of confusion would persist even if a restriction of Creative Action's identification were adopted. (See Exh. A ¶¶ 16, 21)

Argument

In an opposition proceeding, pleadings may be amended to the same extent allowed by the Federal Rules of Civil Procedure, except that an opposition may not be amended to add to the goods or services opposed. 37 CFR § 2.107. As such, a party may amend its pleading by leave of the court and "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

As held in Montblanc-Simplo GmbH v. United Brands International, Inc., 2009 WL 4086591 at *2 (TTAB Sept. 19, 2009):

The Board liberally grants leave to amend pleadings at any stage of the proceeding when justice requires, unless entry of the proposed amendment would be prejudicial to the rights of the adverse party or parties, would violate settled law, or would serve no useful purpose. Fed. R. Civ. P. 15(a). See, e.g., Polaris Industries v. DC Comics, 59 U.S.P.Q.2d 1789 (TTAB 2001); Boral Ltd. V. FMC Corp., 59 U.S.P.Q.2d 1701 (TTAB 2000); and Institut National des Appellations d'Origine v. Brown-Forman Corp., 47 U.S.P.Q.2d 1875, 1896 (TTAB 1998); TBMP § 507.02 (2d ed. Rev. 2004).

In this case, entry of Hasbro's Second Amended Notice is appropriate because it does not seek to add to the goods or services opposed (and, indeed, does not seek to bring any new claim); it properly states a claim for relief under Section 18 of the Lanham Act; it would serve the interests of justice; and it would not cause prejudice to Creative Action.

C. Hasbro's Proposed Amendment Pleads Facts that Will Entitle Hasbro To Relief Under Section 18.

To properly plead a claim under Section 18 of the Lanham Act, a party must plead that "(i) the entry of a proposed restriction to the goods or services in its opponent's application or registration will avoid a finding of likelihood of confusion and (ii) the opponent is not using its mark on those goods or services that will be effectively excluded from the application or registration if the proposed restriction is entered." Eurostar, Inc. v. "Euro-Star" Reitmoden GMBH & Co. KG, 34 U.S.P.Q.2d 1266, 1995 WL 231387 (TTAB 1994) at *5. As this Board recognized in its May 13, 2010, order granting Hasbro's prior motion to amend, Hasbro's First Amended Notice satisfies these requirements. (See Docket # 58) So too does Hasbro's proposed Second Amended Notice.

Hasbro's Second Amended Notice, like the First Amended Notice, pleads that the proposed restrictions (presented in the alternative) would serve to avoid any likelihood of confusion between the parties' marks. (See Exh. A ¶¶ 15, 20) Hasbro also pleads that Creative Action does not use the mark on the goods identified in its application because the actual product sold under the mark is not a game, but rather a therapeutic activity kit (see id. ¶ 9-10), and because it is sold only through narrow, specialized channels of trade to a limited, identifiable class of consumer, both of which Creative Action has identified in sworn interrogatory responses. (See id. ¶ 11)

Accordingly, Hasbro's proposed Second Amended Notice, like its First Amended Notice, pleads facts which, if proven, would establish the necessary elements for a claim for restriction under Section 18. (See Docket # 58 at 8)

D. The Proposed Amendment Would Be In the Interests of Justice.

The entry of the proposed Second Amended Notice would also be in the interests of justice, because it would result in a more accurate identification of goods for Creative Action's product and would allow the Board more flexibility in fashioning a remedy under Section 18 in order to avoid any likelihood of confusion with Hasbro's MEMORY mark.

1. Incorporating Creative Action's Own Language Into the Proposed Restrictions Will Make Them More Accurate.

As noted above, Creative Action has argued against the modified identification of goods proposed in Hasbro's First Amended Notice on the basis that it is overly restrictive because its Memory Magic product is not used only in nursing homes and other elderly care facilities, nor is it used only by elderly persons. Hasbro's proposed Second Amended Notice would address this concern by incorporating language derived directly from Creative Action's sworn interrogatory responses.

In its interrogatory responses, Creative Action described the goods sold and intended to be sold under the Memory Magic mark as follows:

Activity/program for groups and for people with dementia, head trauma or stroke living in long term care facilities or attending adult day care centers and older adults with these cognitive impairments living at home and staff training programs related to the MEMORY MAGIC activity.

(Docket # 77, Exh. 7 at 4) Creative Action also stated that the actual and intended channels of trade for Memory Magic are "trade show exhibits, direct marketing, and distributors of products to health and long term care industries" (*id.* at 5), and that the actual and intended market for Memory Magic is "long-term care facilities, adult day care centers, home health care agencies, psychiatric hospitals and units, and care givers of older adults with dementia, head trauma or stroke who live at home" (*id.* at 5-6).

Hasbro's Second Amended Notice would make Hasbro's proposed restrictions more accurate, as each alternate restriction incorporates nearly all of the above language. Specifically, Hasbro's Second Amended Notice claims that Creative Action's identification of goods should be modified to cover

therapeutic activity kit for groups and for people with dementia, head trauma or stroke living in long term care facilities or attending adult day care centers and older adults with these cognitive impairments living at home, comprised of printed "calling" cards that contain trivia questions and related prompts for discussion, printed cards that contain an array of potential answers to the trivia questions, and boards used to hold the printed answer cards, marketed through trade show exhibits, direct marketing, and distributors of products for the health and long term care industries, sold to long-term care facilities, adult day care centers, home health care agencies, psychiatric hospitals and units, and care givers of older adults with dementia, head trauma or stroke who live at home.

In the alternative, if the Board ultimately concludes that Memory Magic should be described as a game, the description should read:

therapeutic game for groups and for people with dementia, head trauma or stroke living in long term care facilities or attending adult day care centers and older adults with these cognitive impairments living at home, comprised of printed "calling" cards that contain trivia questions and related prompts for discussion, printed cards that contain an array of potential answers to the trivia questions, and boards used to hold the printed answer cards, marketed through trade show exhibits, direct marketing, and distributors of products for the health and long term care industries, sold to long-term care facilities, adult day care centers, home health care agencies, psychiatric hospitals and units, and care givers of older adults with dementia, head trauma or stroke who live at home.

(Ex. A. ¶¶ 13, 19)

2. The Proposed Restrictions Are Not Impermissibly Indefinite Nor Would They Impermissibly Expand the Scope of the Identification.

The proposed revisions in Hasbro's Second Amended Notice would cure the Board's objection that the requested description would be impermissibly indefinite and would not impermissibly expand the scope of Creative Action's identification. Like the proposed restriction in Hasbro's First Amended Notice (but not in Hasbro's cross motion for summary judgment), the restrictions proposed in the alternative in Hasbro's Second Amended Notice set forth the nature and composition of the product at issue. (See Exh. A ¶¶ 13, 19, describing the Memory Magic product as a "therapeutic activity kit" or "therapeutic game," "comprised of printed 'calling' cards that contain trivia questions and related prompts for discussion, printed cards that contain an array of potential answers to the trivia questions, and boards used to hold the printed answer cards").

3. The Second Amended Notice Provides Greater Flexibility for Avoiding Likelihood of Confusion.

The Second Amended Notice also allows for greater flexibility than Hasbro's First Amended Notice. If the Board concludes that the language proposed by Hasbro in its Second Amended Notice should be modified to more accurately describe the Memory Magic product or to satisfy any requirements for registration, Hasbro specifically invites the Board to adopt any similar restriction it deems appropriate. (See Exh. A ¶¶ 13, 19) The goal of Hasbro's Section 18 claim is simply to modify Creative Action's registration to accurately describe the Memory Magic product and to avoid any likelihood of confusion with Hasbro's MEMORY mark; Hasbro will accept any language adopted by the Board that achieves this end.

The structure of Hasbro's Section 18 claim in the Second Amended Notice, which pleads two proposed restrictions in the alternative (see *id.* ¶¶ 8-21), serves the same goal. Hasbro

believes and intends to prove that the Memory Magic product is not a game, and thus that it is not properly classified in International Class 28 and that Creative Action does not use its mark on goods that would be effectively excluded from an identification that omits the word “game.”

However, if the Board should ultimately disagree with Hasbro on this point, Hasbro’s Second Amended Notice asks the Board to nonetheless restrict Creative Action’s identification by incorporating its channels of trade and intended purchasers and users, which will render its identification more accurate and avoid any likelihood of confusion with Hasbro’s mark.

Moreover, while Hasbro believes and pleads that either proposed restriction in the Second Amended Notice will be sufficient to avoid any likelihood of confusion between the parties’ marks, the Second Amended Notice makes clear that Hasbro will be willing to restrict its own identifications if the Board concludes it is necessary to avoid a likelihood of confusion. (Id. ¶¶ 16, 21)

In all of these ways, the Second Amended Notice invites the Board to take the steps it deems necessary to avoid a likelihood of confusion between the parties marks. This serves the purposes of Section 18 of the Lanham Act¹ and the interests of justice.

E. The Proposed Amendment Would Not Result In Any Prejudice to Creative Action.

Finally, granting the instant motion would not result in any prejudice to Creative Action. As noted above, Hasbro’s proposed Second Amended Notice would not add any new

¹ As discussed in Hasbro’s briefing on its first motion to amend (Docket # 52) and its motion for summary judgment (Docket # 72), Section 18 was adopted to give the Board the flexibility to take real-world facts into consideration in its decisions. See THE UNITED STATES TRADEMARK ASSOCIATION TRADEMARK REVIEW COMMISSION, REPORT AND RECOMMENDATIONS TO USTA PRESIDENT AND BOARD OF DIRECTORS, 77 TRADEMARK REP. 452 (1987); STAFF OF SENATE COMM. ON THE JUDICIARY, 100TH CONG., REPORT ON TRADEMARK LAW REVISION ACT OF 1988 (Comm. Print 1988).

claim. The new language it contains, which relates only to Hasbro's Section 18 claim, would not require any additional discovery. Moreover, the testimony periods of this opposition have not yet begun, and Creative Action's testimony period is not scheduled to commence until mid-July. (See Docket # 82 at 10) If Creative Action wishes to make any adjustments to its planned defense in light of the limited differences between Hasbro's First Amended Notice and Second Amended Notice, it will have ample time to do so.

Conclusion

For the foregoing reasons, the Board should grant Hasbro's Second Motion to Amend Opposer's Notice of Opposition and enter Hasbro's proposed Second Amended Notice of Opposition as the operative pleading in this action.

Dated: April 20, 2011

Respectfully submitted,




Kim J. Landsman
Claire Frost
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Attorneys for Opposer Hasbro, Inc.

ELECTRONIC MAILING CERTIFICATE

I hereby certify that this **SECOND MOTION TO AMEND OPPOSER'S NOTICE OF OPPOSITION** is being submitted electronically through the Electronic System for the Trademark Trial and Appeal Board ("ESTTA") on this 20th day of April, 2011.

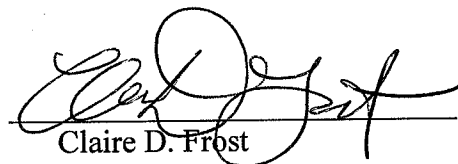


Claire D. Frost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **SECOND MOTION TO AMEND OPPOSER'S NOTICE OF OPPOSITION** was served by electronic mail on April 20, 2011, on the following counsel for the Applicant:

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Claire D. Frost

EXHIBIT A

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 78/359,895
Filed: January 30, 2004
For the Mark: MEMORY MAGIC in International Class 28
Published in the Official Gazette: May 10, 2005 at TM 330

HASBRO, INC.

Opposer,

v.

CREATIVE ACTION LLC,

Applicant.

Opposition No. 91/166,487

SECOND AMENDED NOTICE OF OPPOSITION

Hasbro, Inc. ("Opposer") believes that it will be damaged by the registration of the trademark covered by Application Serial No. 78/359,895 (the "Application") filed on January 30, 2004, by Creative Action LLC (the "Applicant"), and hereby opposes the registration of the trademark.

As grounds for opposition, it is alleged that:

1. Opposer is a Rhode Island corporation having its headquarters and its principal place of business at 1027 Newport Avenue, Pawtucket, Rhode Island 02862-1059.
2. Applicant, upon information and belief, is an Ohio limited liability company having a place of business at 680 North Portage Path, Akron, Ohio 44303.
3. Opposer markets and sells the MEMORY® card games. Opposer is the owner of certain trademarks in these games that are the subject of the following federal registrations issued on the Principal Register, all of which are in full force and effect, as shown

by the records of the U.S. Patent and Trademark Office (collectively, the “Trademarks”), including but not limited to the following (TESS/TARR and Assignment printouts are attached as Exhibits 1 and 2):

A. Registration No. 2,894,970 for MEMORY: Registered on October 19, 2004, in International Class 28 for “card matching games.”

B. Registration No. 834,282 for MEMORY: Registered on August 29, 1967 in International Class 28 for “equipment comprising cards with many matching pairs of designs for playing a matching card game.”

4. Opposer or its predecessors in interest began selling the MEMORY® card games in commerce in the United States in 1966 and have used the Trademark in United States commerce in substantially identical form in connection with the MEMORY® card games for over 40 years.

5. As illustrated in the Official Gazette dated January 30, 2005, at page TM 330, Applicant seeks to register and use the trademark “MEMORY MAGIC” in International Class 28, alleging an intent to use.

6. No issue of priority exists between Opposer’s Trademark and the alleged “MEMORY MAGIC” trademark. Opposer’s date of adoption and first use precedes Applicant’s, as Applicant had not used its mark in commerce at the time of the Application, and sought registration based only on an intent to use.

7. In the Application, Applicant asserts that it intends to use its alleged “MEMORY MAGIC” mark in connection with a “therapeutic game in the nature of a trivia game and a bingo game for engaging persons with memory loss consisting of game cards that contain answers to questions and calling cards that contain questions and information thereto.”

Count I(A): Restriction and Modification Under Section 18, 15 U.S.C. § 1068 (Restriction and Modification to Reflect that Applicant Does Not Use or Intend to Use the “MEMORY MAGIC” Mark in Connection with a Game)

8. Opposer repeats and realleges each and every allegation set forth in Paragraphs 1 through 7.

9. Applicant’s identification of goods is overbroad and inaccurate. It is not using, nor does it intend to use, the “MEMORY MAGIC” mark in commerce for the goods identified in its Application.

10. Applicant is not using, nor does it intend to use, the “MEMORY MAGIC” mark for a “game” at all. Rather, Applicant’s “MEMORY MAGIC” mark is used and intended for use only in connection with a therapeutic activity kit for persons with dementia or other mental impairments as detailed in Applicant’s sworn interrogatory responses.

11. Further, Applicant’s “MEMORY MAGIC” product is sold and intended to be sold only through narrow, specialized channels of trade to a limited, identifiable class of consumer, both of which Applicant has identified in sworn interrogatory responses.

12. The identification of goods in the Application should be restricted under Section 18, 15 U.S.C. § 1068, to properly reflect the actual goods sold or intended to be sold by Applicant and the particular channels of trade and class of consumer for such goods.

13. Accordingly, based on Applicant’s sworn interrogatory responses, the Application should be restricted as follows or by means of any similar language that the Board deems appropriate:

therapeutic activity kit for groups and for people with dementia, head trauma or stroke living in long term care facilities or attending adult day care centers and older adults with these cognitive impairments living at home, comprised of printed "calling" cards that contain trivia questions and related prompts for discussion, printed cards that contain an array of potential answers to the trivia questions, and boards used to hold the printed answer

cards, marketed through trade show exhibits, direct marketing, and distributors of products for the health and long term care industries, sold to long-term care facilities, adult day care centers, home health care agencies, psychiatric hospitals and units, and care givers of older adults with dementia, head trauma or stroke who live at home.

14. Because the goods consist of a therapeutic kit rather than a game, the Application should be reclassified as International Class 10 or Class 16, not International Class 28.

15. The requested restriction and modification of the Application pursuant to Section 18 of the Lanham Act, 15 U.S.C. § 1068, will avoid any likelihood of harm to Opposer by avoiding any likelihood of confusion with Opposer's MEMORY mark.

16. However, only if the Board finds that the requested restriction and modification of the Application is not sufficient to avoid any likelihood of confusion with Opposer's MEMORY mark, Opposer will agree to restrict its own registrations for the MEMORY mark from "card matching games" to "children's card matching games" and from "equipment comprising cards with many matching pairs of designs for playing a matching card game" to "equipment comprising cards with many matching pairs of designs for playing a children's matching card game," respectively. These restriction, in conjunction with the requested restriction and modification of the Application, will avoid any likelihood of harm to Opposer by avoiding any likelihood of confusion between Opposer's MEMORY mark and Applicant's alleged "MEMORY MAGIC" mark.

Count I(B): Alternative Claim for Restriction and Modification Under Section 18, 15 U.S.C. § 1068 (Restriction and Modification to Reflect Actual and Intended Channels of Trade and Class of Consumer)

17. Opposer repeats and realleges each and every allegation set forth in Paragraphs 1 through 15.

18. In the alternative, and only if the Board holds that Applicant's "MEMORY MAGIC" mark is used or intended to be used in connection with a game, Applicant's identification of goods in the Application should be restricted under Section 18, 15 U.S.C. § 1068, to properly reflect the particular channels of trade and class of consumer for such goods.

19. Accordingly, the Application should be restricted as follows or by means of any similar language that the Board deems appropriate:

therapeutic game for groups and for people with dementia, head trauma or stroke living in long term care facilities or attending adult day care centers and older adults with these cognitive impairments living at home, comprised of printed "calling" cards that contain trivia questions and related prompts for discussion, printed cards that contain an array of potential answers to the trivia questions, and boards used to hold the printed answer cards, marketed through trade show exhibits, direct marketing, and distributors of products for the health and long term care industries, sold to long-term care facilities, adult day care centers, home health care agencies, psychiatric hospitals and units, and care givers of older adults with dementia, head trauma or stroke who live at home.

20. This alternate restriction and modification of the Application pursuant to Section 18 of the Lanham Act, 15 U.S.C. § 1068, will also avoid any likelihood of harm to Opposer by avoiding any likelihood of confusion with Opposer's MEMORY mark.

21. However, only if the Board finds that the requested restriction and modification of the Application is not sufficient to avoid any likelihood of confusion with Opposer's MEMORY mark, Opposer will agree to restrict its own registrations for the MEMORY mark from "card matching games" to "children's card matching games" and from "equipment comprising cards with many matching pairs of designs for playing a matching card game" to "equipment comprising cards with many matching pairs of designs for playing a children's matching card game," respectively. These restrictions, in conjunction with the

requested restriction and modification of the Application, will avoid any likelihood of harm to Opposer by avoiding any likelihood of confusion between Opposer's MEMORY mark and Applicant's alleged "MEMORY MAGIC" mark.

Count II: Lack of Bona Fide Intent to Use Under 15 U.S.C. § 1051(b)

22. Opposer repeats and realleges each and every allegation set forth in Paragraphs 1 through 19.

23. Applicant lacked the requisite bona fide intent to use the mark in commerce under 15 U.S.C. § 1051(b) on or in connection with the goods listed in the Application as of the filing date of the Application, and continuing to date.

24. Accordingly, the Application is void and should be refused registration.

WHEREFORE, Opposer prays that this Opposition be sustained, and that the Application for "MEMORY MAGIC" be refused, restricted, and/or modified by this Board as set forth above.

Please recognize Kim J. Landsman and Claire D. Frost, Patterson Belknap Webb & Tyler LLP, 1133 Avenue of the Americas, New York, NY 10036-6710, both members of the Bar of the State of New York, as the attorneys for the Opposer in this proceeding. All communications are to be directed to Kim J. Landsman at the address identified above.

Dated: April 20, 2011

Respectfully submitted,

PATTERSON BELKNAP WEBB & TYLER LLP

A handwritten signature in cursive script that reads "Kim J. Landsman". The signature is written in black ink and has a fluid, connected style.

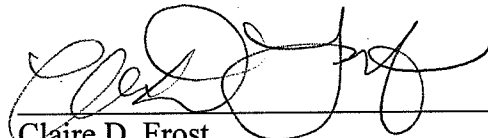
By _____

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ELECTRONIC MAILING CERTIFICATE

I hereby certify that the **Second Amended Notice of Opposition** is being submitted electronically through the Electronic System for the Trademark Trial and Appeal Board ("ESTTA") on this 20th day of April, 2011.

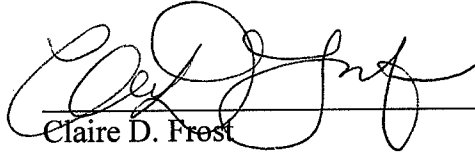


Claire D. Frost

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Second Amended Notice of Opposition** was served by electronic mail on April 20, 2011, on the following counsel for the Applicant:

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Claire D. Frost

SECOND AMENDED NOTICE

EXHIBIT 1

Int. Cl.: 28

Prior U.S. Cls.: 22, 23, 38 and 50

United States Patent and Trademark Office

Reg. No. 2,894,970

Registered Oct. 19, 2004

**TRADEMARK
PRINCIPAL REGISTER**

MEMORY

HASBRO, INC. (RHODE ISLAND CORPORATION)
1027 NEWPORT AVENUE
PAWTUCKET, RI 02862

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

FOR: CARD MATCHING GAMES, IN CLASS 28
(U.S. CLS. 22, 23, 38 AND 50).

SER. NO. 76-556,433, FILED 11-4-2003.

FIRST USE 1-1-1966; IN COMMERCE 1-1-1966.

SUSAN HAYASH, EXAMINING ATTORNEY

SECOND AMENDED NOTICE

EXHIBIT 2

United States Patent Office

834,282
Registered Aug. 29, 1967

PRINCIPAL REGISTER Trademark

Ser. No. 244,660, filed May 2, 1966

memory

Milton Bradley Company (Massachusetts corporation)
74 Park St.
Springfield, Mass.

For: EQUIPMENT COMPRISING CARDS WITH
MANY MATCHING PAIRS OF DESIGNS FOR PLAY-
ING A MATCHING CARD GAME, in CLASS 22.
First use Jan. 1, 1966; in commerce Jan. 1, 1966.